(1)

Supreme Court, U.S.
FILED

No. 03 777 NOV 21 2003

In The

Supreme Court of the United States

WILLIE R. FLINT,
on behalf of himself
and all others similarly situated,

Petitioner,

v.

ABB, INC., f/k/a
ABB POWER T&D CO., INC., et al.

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Gary Gerrard
Counsel of Record
Gary Gerrard, P.A.
107 Platt Street
P.O. Box 542
Lexington, GA 30648
(706) 743-3080
Counsel for Petitioner

63 pp

QUESTIONS PRESENTED

Does § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), authorize an ERISA plan beneficiary to recover interest on benefits paid retroactively after a successful administrative appeal when the employee-benefit plan does not explicitly provide for interest on reinstated benefits.

Does ERISA § 502(a)(1)(B) or § 502(a)(3)(B) authorize a beneficiary to recover interest on benefits paid after the date the benefits were due under the Plan absent an explicit Plan provision requiring the Plan to pay such interest.

May a district court dismiss a complaint with prejudice without considering materials submitted by the plaintiff to show that even without the benefit of discovery it is not "beyond doubt" that he can prove facts to support a claim which would entitle him to relief?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

I. ABB Abruptly Terminated Flint's LTD Benefits After Nearly Three Years 3

II. Flint Appeals The Termination And ABB Retroactively Reinstates His Benefits 3

III. ABB Refuses To Pay Interest Because Its Plan Does Not Explicitly Require Interest On Retroactive Benefits 7

IV. Proceedings Below 7

A. District Court 7

1. Flint's Complaint For Interest On "Delayed Benefits" Pursuant To § 502(a)(1)(B) Is Dismissed. 7

2. Flint's Amended Complaint Is Dismissed With Prejudice 8

TABLE OF CONTENTS - Continued

Page

B. The Court Of Appeals Affirmed 11

REASONS FOR GRANTING THE PETITION 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Clair v. Harris Trust & Sav. Bank, 190 F.3d 495 (7th Cir. 1999) 14

Curtis v. Innerarity, 6 How. 146, 154, 12 L.Ed. 380 (1848) 12

Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981), cert denied 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 834 (1981) 13

Dunnigan v. Metropolitan Life Ins. Co., 277 F.3d 223 (2d Cir. 2002) 14

Fotta v. Trustees of the United Mine Workers of America, 165 F.3d 209, 213 (3d Cir. 1998), appeal after remand, 319 F.3d 612 (3d Cir. 2003) cert. denied, --- S.Ct. ---, 2003 WL 22004958, 72 USLW 3148, 72 USLW 3302, 72 USLW 3307 (U.S. Nov 03, 2003) (NO. 03-260) 14

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) 11, 12, 14

Jackson v. Fortis Benefits Ins. Co., 245 F.3d 748, (8th Cir. 2001) 14

TABLE OF AUTHORITIES - Continued

Page

Kerr v. Charles F. Vatterott & Co., 184 F.3d 938 (8th Cir. 1999) 14

Lutheran Medical Center of Omaha, NE v. Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan, 25 F.3d 616 (8th Cir. 1994) 13

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) 12

Miller v. Robertson, 266 U.S. 243, 45 S.Ct. 73, 69 L.Ed. 265 (1924) 13

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980) 12

Quesinberry v. Life Insurance Company of North America, 987 F.2d 1017 (4th Cir. 1993) 13

Rivera v. Benefit Trust Life Insurance Company, 912 F.2d 692 (7th Cir. 1991) 13

Rodgers v. United States, 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947) 13

TABLE OF AUTHORITIES - Continued

Page

Schake v. Colt Industries Operating Corp. Severance Plan for Salaried Employees, 960 F.2d 1187 (3rd Cir. 1992) 13

Smith v. Am. Int'l. Life Assur. Co. of N.Y., 60 F.3d 956 (11th Cir. 1995) 13

Swierkiewicz v. Sorema N. A. –U.S.–, 122 S.Ct. 992, 152 L.Ed.2d 1, 70 USLW 4152 (2002) 15

Tieneyer v. Community Mutual Insurance Co., 8 F.3d 1094 (6th Cir. 1993) 13

STATUTES

29 U.S.C. § 1022 5

29 U.S.C. § 1132(e)(1) 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

29 U.S.C. § 1024(b)(4) 9

29 U.S.C. § 1132 2

TABLE OF AUTHORITIES - Continued

Page

29 U.S.C. § 1132(a)(1)(B) 2, 7

ERISA § 502(a)(1)(B) 2, 7, 8, 11, 14

ERISA § 502(a)(3)(B) 8, 11, 12, 14

MISCELLANEOUS

2 *Fonblanque, Eq.* 423 12

Restatement (Second) of Contracts § 354
and comment c (1979) 12

PETITION FOR A WRIT OF CERTIORARI

Willie R. Flint respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1-12) is reported at 337 F.3d 1326 (11th Cir. 2003). The last district court opinion (App. 13-28) is reported at 229 F.Supp.2d 1338 (S.D. FL 2002), while the first order (App. 29-38) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 21, 2002 (App. 1-12). Timely filed petition for rehearing was denied August 27, 2003 (App. 39-40) the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA § 502(a)(1)(B); 29 U.S.C. § 1132. Civil enforcement
(a) Persons empowered to bring a civil action
A civil action may be brought–
(1) by a participant or beneficiary– . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

STATEMENT[1]

Pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Flint, individually and as a class representative, sued ABB alleging its refusal to pay interest on retroactively reinstated benefits was "contrary to the terms of Flint's and each Class member's Plan, unreasonable, arbitrary and

[1] All emphasis is supplied unless indicated otherwise.

capricious, and a breach of the obligation to pay full and complete benefits." Original jurisdiction was predicated on 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

I. ABB Abruptly Terminated Flint's LTD Benefits After Nearly Three Years.

In March 1998, Flint, a 20 plus year employee of ABB, was rendered totally disabled in an automobile accident. In due course, he applied for and received long term disability (LTD) benefits under ABB's ERISA Plan.

Nearly three years later, by letter of June 19, 2001, ABB's claim processor, Kemper National Services (KNS), without warning notified Flint that he "no longer [met] the ABB, Inc., definition of Total Disability," based on a review of medical information and a "labor market survey" that identified two jobs Flint supposedly could do based on his "residual physical abilities" and "transferable skills."

II Flint Appealed the Termination and ABB Retroactively Reinstated His Benefits.

By letter of July 2, 2001, Flint initiated his first administrative appeal with an extensive 1999 vocational evaluation by Dr. Jack Sink, a Certified Vocational Evaluator, who found Flint "essentially illiterate," tested intelligence in the "fifth percentile," with no transferrable skills, and totally and

permanently disabled from any gainful employment.[2] On August 31, 2001, ABB denied Flint's appeal, finding the 1999 report irrelevant to Flint's employability in 2001.

Before his second administrative appeal, Flint requested ABB furnish all Plan documents pertaining to Flint's LTD benefits. The documents KNS mailed on October 17, 2001 were out of date (they named the wrong plan sponsor and identified an insurance company as the administrator and insurer of the plan when ABB is the sponsor and administrator, and since at least 1995 the plan has been self-funded by employee contributions), incomplete, erroneous, and self-contradictory, and stated, "If there is any conflict between the provisions of this book and a Plan document, the terms of the Plan document will control."

There appeared to be two LTD Plans and a General Information section. (This section stated it applied to *salaried* employees represented by the Athens Westinghouse Employees Association, while Flint was an hourly, IBEW 2109 employee.)[3] ABB argued below that the documents contained both the Plan

---

[2] The facts are stated most liberally for Flint since the district court stayed all discovery and dismissed his amended complaint with prejudice. Some facts, such as the content of the July 2, 2001, letter, do not appear in the court of appeals' opinion or the district court opinions. Nevertheless, every fact stated herein can be proved unequivocally, even without the benefit of discovery.

[3] In Reply to Flint's Opposition to ABB's Motion to Dismiss, ABB attached a different "General Information" section never previously provided to Flint, and claimed it applied.

and the Summary Plan Description (SPD); however, nowhere did "SPD" or "Summary Plan Description" appear in any of the documents.[4] The language ultimately relied on by the district court and court of appeals about when benefits could be terminated was in the portion ABB claimed was the SPD, and it conflicted with the language of the "Plan document."

Each "Plan" and ABB's June 19, 2001, termination letter defines disability differently:

> ***First Plan (Probably the SPD)***: ". . . you cannot do any gainful work that you are suited for by education, training or experience in or outside ABB."
>
> ***Second Plan (Probably the Plan Document)***: "inability . . . to engage in any gainful occupation for which you are reasonably fitted by education, training or experience."
>
> ***June 19, 2001, Notice of Termination***: unable to "perform any occupation for which you are ***or could become*** qualified based on your education, training and experience."

The "Plans" also disagree on when benefits may be terminated:

---

[4] 29 U.S.C. § 1022

First Plan: **"When Benefits Stop**

In all cases, LTD benefits stop if you:
Are no longer totally disabled or do not give proof of your continued disability."

Second Plan: **". . . benefits cease when you recover or become actively employed or upon your death.**

* * *

In no case will benefits be paid by this Plan:

1. **For any period on or after the date you fail to furnish satisfactory proof, as required by the insurance company, of the continuance of total disability."**

KNS's Termination Letter does not state that Flint had "recovered" or that he was "actively employed." And, ABB never gave Flint an opportunity to furnish proof of his continued total disability before it terminated his benefits.

Flint's second administrative appeal of October 29, 2001 included an updated evaluation by Dr. Sink stating that as in 1999, Flint remained totally and permanently disabled from any gainful employment.[5] Flint's doctor would not see him until after the second appeal period, so Flint requested ABB allow additional time to submit the doctor's report, which ABB did, and Flint mailed the report on December 17, 2001.

By letter of December 20, 2001, ABB notified Flint of its

---

[5] The district court and court of appeals' opinions incorrectly state that Flint submitted additional *medical* information with his October appeal.

decision to reinstate his benefits retroactively. Thus, it is extremely unlikely the doctor's report stating Flint "cannot do much work" was received or considered by ABB.

III. ABB Refused To Pay Interest Because Its Plan Does Not Explicitly Require Interest On Retroactive Benefits.

Flint demanded interest on the retroactive benefits, but ABB refused because ABB's Plan did not explicitly require it, and therefore, ABB ***never*** pays interest on reinstated benefits. The Plan documents provided to Flint are silent on whether interest is due on benefits paid after they are due.

IV. Proceedings Below

A. District Court

1. Flint's Complaint For Interest On "Delayed Benefits" Pursuant To § 502(a)(1)(B) Is Dismissed.

Pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Flint, individually and as a class representative of all ABB Plan beneficiaries, sued ABB alleging its refusal to pay interest was "contrary to the terms of Flint's and each Class member's Plan, unreasonable, arbitrary and capricious, and a breach of the obligation to pay full and complete benefits." Flint did not attach Plan documents to his original complaint

because of the many errors in those ABB produced, intending instead to establish the exact Plan terms through discovery.

ABB moved to dismiss the complaint and attached to its motion unverified copies of the Plan documents previously supplied to Flint. Despite Flint's request, these copies were never sworn to by ABB or affirmatively represented by ABB's counsel to be all the applicable Plan documents.[6] The district court stayed discovery and thus prevented Flint's verification of the Plan terms under oath.

The District Court dismissed Flint's Complaint holding that a claim for interest on "delayed benefits" is not allowed under § 502(a)(1)(B), when the Plan document itself does not expressly require it, but that § 502(a)(3)(B) may authorize interest as "other appropriate equitable relief" if Flint could plead "unreasonable delay in payment of benefits" or that they were "wrongfully withheld or 'delayed' in violation of any provision of the Plan or ERISA." (App. 32-34)

2. Flint's Amended Complaint Is Dismissed With Prejudice.

Flint amended his complaint and attached the Plan

---

[6] This became particularly troublesome when ABB initiated another annual review of Flint's continued eligibility for LTD benefits while the case was pending in the court of appeals. Flint again requested the Plan documents, and KNS provided a completely different set of Plan documents. The court of appeals granted Flint's Motion to Supplement the Record with this later set of documents.

documents previously provided by ABB. He alleged they were incomplete and contradictory and that ABB had refused to allow any representative of Flint to review all Plan documents at ABB's offices.[7] Thus, he could not be sure any of them were accurate and discovery was necessary to determine the exact plan documents.

The Amended Complaint also alleged various breaches of ERISA and the Plan which caused an unreasonable delay in the payment of his benefits:

- ABB failed to require or allow Flint to furnish evidence of continued total disability before terminating his benefits.
- The reasons and information recited in the termination letter were a sham.
- ABB's policy to ***never*** pay interest on delayed benefits is a violation of the Plans' express or implied terms.

In responding to ABB's motion to dismiss, Flint filed various documents not attached to the amended complaint to demonstrate that he could prove a set of facts consistent with the complaint that would entitle him to relief. The district court refused to consider them, and the court of appeals by its silence seems to have done likewise. These documents demonstrated the notice of termination was a sham:

- The termination letter misstated and omitted medical

---

[7] 29 U.S.C. § 1024(b)(4).

information in ABB's possession demonstrating Flint was totally disabled.

The "labor market survey" included false information. Of the two jobs "identified" for Flint, he was incapable of performing either. Dr. Sink's report submitted with Flint's second administrative appeal pointed out several blatant falsehoods when it concludes:

> [The] August 31, 2001 letter[8] . . . suggests that to be eligible for disability insurance, Mr. Flint would have to be determined to be unable to "perform any occupation for which you are ***or could become*** qualified based on your education, training and experience." It is obvious that the labor market survey which was done by Ms. Chapman did not consider Mr. Flint's education (either grade completion or tested) and, since he has had no training or experience which is beneficial to him to future employment, it appears obvious that they were not considered either. In addition, Mr. Flint's inability to complete even a job application nor his inability to read sufficiently to understand job specifications, descriptions, etc., were considered. Therefore, there is no valid information found in these documents which invalidate the opinion in my

---

[8] This letter denies Flint's initial appeal of his termination, which provided to KNS Dr. Sink's March 26, 1999 occupational evaluation that concluded Flint was totally and permanently disabled from any gainful occupation.

report of March 26, 1999.

The district court stayed discovery and dismissed the amended complaint with prejudice reiterating its previous ruling on § 502(a)(1)(B), and further finding that (1) the Plan document did not require advanced notice before terminating Flint's benefits; (2) the notice of termination was adequate and "additional factual issues that are not pled and/or referenced in the First Amended Complaint" were not considered as "improperly before the court," (3) the plan documents provided to Flint are not unclear or contradictory, and even if they are, that would not support equitable relief under § 502(a)(3)(B), (4) the timely appeal process resulting in retroactive reinstatement of Flint's LTD benefits would not support an award of interest, and (5) The request for declaratory judgment and injunction regarding future benefits was not reached because Flint failed to state a claim for interest on delayed benefits.

B. The Court Of Appeals Affirmed.

The court of appeals rejected Flint's § 502(a)(1)(B) claim because it supposedly would require creating a "new cause of action" not explicitly authorized by ERISA, which this Court has repeatedly shunned. (App. 5-7) It rejected Flint's § 502(a)(3)(B) claim because (1) as a simple claim for money, it is not equitable relief and thus prohibited by *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), and (2) as a request for "other appropriate equitable relief" for ABB violating its fiduciary

duty when it terminated Flint's benefits, the complaint failed to state a claim.

REASONS FOR GRANTING THE PETITION

The first two questions presented regarding interest on overdue ERISA benefits affect every worker in this country who does or will receive benefits from an ERISA Plan.

ERISA Plans are contractual. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). This court recognized over 150 years ago that interest on unpaid obligations to pay money is an implied term of all contracts. *Curtis v. Innerarity*, 6 How. 146, 154, 12 L.Ed. 380 (1848). The authority this court cited for that proposition, 2 *Fonblanque, Eq.* 423, is itself over 300 years old. *See also Restatement (Second) of Contracts* § 354 and comment c (1979)(unless otherwise agreed, interest is *always* recoverable for the nonpayment of money once payment has become due and there is a breach). Interest is not a new cause of action. It is the full amount contracted for.

Congress enacted ERISA to "promote the interests of employees and their beneficiaries in employee benefit plans," *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-362, 100 S.Ct. 1723, 1726-1727, 64 L.Ed.2d 354 (1980). If Congress intended to include the fine historical distinctions between law and equity when it allowed "other appropriate equitable relief" in § 502(a)(3)(B), *Knudson*; surely it did not intend to overrule, *sub silento*, over 150 years

of contract law making interest an implied term of all contracts.

The first circuit court to consider interest on unpaid benefits noted ERISA's silence. *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), cert denied 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 834 (1981). Relying on decisions of this court involving other federal statutes that are silent on interest, *Miller v. Robertson*, 266 U.S. 243, 256-258, 45 S.Ct. 73, (78-79) 69 L.Ed. 265 (1924); *Rodgers v. United States*, 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947); the eighth circuit found prejudgment interest appropriate despite ERISA's silence. *Dependahl* at 1218-1219. Other circuits agree: *Smith v. Am. Int'l. Life Assur. Co. of N.Y.*, 50 F.3d 956 (11th Cir. 1995); *Lutheran Medical Center of Omaha, NE v. Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan*, 25 F.3d 616 (8th Cir. 1994) (prejudgment interest compensates for delayed payment of benefits and makes beneficiary whole for denied use of money); *Tieneyer v. Community Mutual Insurance Co.*, 8 F.3d 1094 (6th Cir. 1993) (abuse of discretion not to award prejudgment interest); *Quesinberry v. Life Insurance Company of North America*, 987 F.2d 1017 (4th Cir. 1993) (error to deny prejudgment interest); *Schake v. Colt Industries Operating Corp. Severance Plan for Salaried Employees*, 960 F.2d 1187, 1192 n. 4 (3rd Cir. 1992); *Rivera v. Benefit Trust Life Insurance Company*, 921 F.2d 692 (7th Cir. 1991) (prejudgment interest prevents unjust enrichment when interest was earned on funds which should have been paid for benefits). Thus, when a *court* enters judgment for overdue benefits, interest is necessary for complete relief.

The issue here is whether a different rule applies when

benefits are paid retroactively to the due date as a result of a successful administrative appeal.

Several circuit courts have considered the issue. Most have declined to even rule on § 502(a)(1)(B), instead relying on § 502(a)(3)(B). Still the answers are conflicting. *Fotta v. Trustees of the United Mine Workers of America,* 165 F.3d 209, 213 (3d Cir. 1998), appeal after remand, 319 F.3d 612 (3d Cir. 2003) cert. denied, --- S.Ct. ---, 2003 WL 22004958, 72 USLW 3148, 72 USLW 3302, 72 USLW 3307 (U.S. Nov 03, 2003) (NO. 03-260); *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223 (2d Cir. 2002); *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748,749-50 (8th Cir. 2001); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999); *Clair v. Harris Trust & Sav. Bank.*, 190 F.3d 495, 498 (7th Cir. 1999). And, as the court of appeals below noted, *Knudson* has cast doubt on those cases relying on § 502(a)(3)(B).

The circuit court below adhered to this court's admonition against implying causes of action or remedies not specifically stated in ERISA and denied relief because it viewed interest on retroactively reinstated benefits as creating a new cause of action, not a matter of granting the full benefit due the beneficiary, for which § 502(a)(1)(B) provides an explicit remedy. (App. 7) The recovery of interest is no more a "new cause of action" than is a claim that ABB miscalculated, and therefore underpaid, benefits due under its Plan.

This court may take judicial notice of the fact that many ERISA plans are funded by insurance policies and the insurance companies are usually the Plan administrator with the discretion to interpret their own insurance policies as to when benefits are

due. Indeed, the Plan documents provided by ABB, though out of date, state the Plan is insured and administered by an insurance company who has the final discretion in deciding claims. To deny interest when an insurer or other Plan administrator terminates ongoing benefits and then reinstates them retroactively is nothing short of an invitation to terminate benefits and see which beneficiaries have the wherewithal and fortitude to fight. And, to those who do, pay benefits as a result of an administrative appeal while retaining the interest on the withheld benefits. It is a license to steal! And by a fiduciary!

ABB will respond that "wrongfully" withheld benefits may entitle the beneficiary to interest, but ABB did not act "wrongfully" because the appeal process was timely. Still, the retroactive payment means the benefits were due before they were paid, and the court of appeals held that Flint's allegation that the termination was a sham was insufficient to allege a claim upon which relief could be granted.[9] This is all the more poignant since Flint attached documents to his response to ABB's motion to dismiss to support his allegations as a matter of fact, not speculation, but the district court (App. 23) and court of appeals refused to even consider them, or allow Flint to amend to allege specifically the facts demonstrated by those documents. *Swierkiewicz v. Sorema N. A.* –U.S.–, 122 S.Ct. 992, 152 L.Ed.2d 1, 70 USLW 4152 (2002).

---

[9] Each of the other reasons given by the court of appeals is factually wrong as a matter of the record below; however, Flint has omitted these errors because of this Court's admonition in Rule 10. Should the Court grant this petition, those errors would be demonstrated in a brief on the merits.

CONCLUSION

The Petition for Writ of Certiorari should be granted on each of the questions presented.

Respectfully submitted,

Gary Gerrard
Counsel of Record
107 Platt Street
P.O. Box 542
Lexington, GA 30648
(706) 743-3080
Counsel for Petitioner